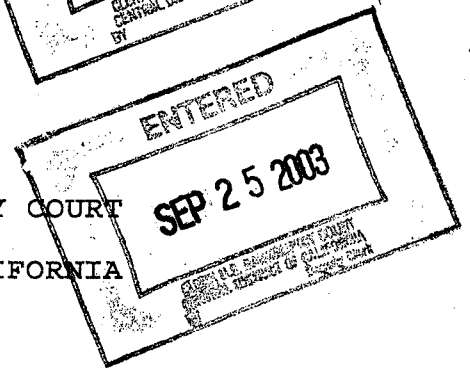
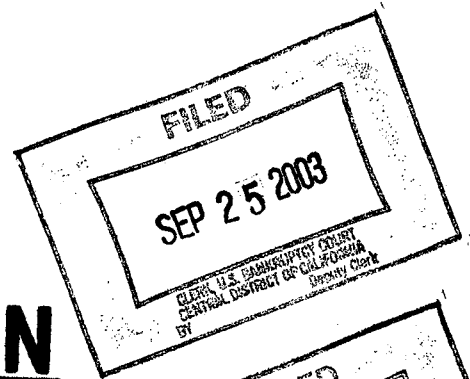


FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re

GRAYSON LEE HOBERG,

Debtor.

Chapter 7

Case No. SV 01-16502-AG
Adv. No. SV 01-01672-AG

LAURA HOBERG, FRANK FOX,
FOX AND FOX,

Plaintiffs,

v.

GRAYSON LEE HOBERG,

Defendant.

MEMORANDUM DECISION

Preliminary Statement

On July 5, 2001, the Debtor, Grayson Lee Hoberg, filed a voluntary Chapter 7 petition. Thereafter, Plaintiff, Laura Hoberg, the Debtor's former wife, filed a complaint for nondischargeability pursuant to 11 U.S.C. §§ 523(a)(2), (a)(5) and (a)(15) on December 5, 2001.

The Plaintiff and the Debtor were married for approximately

4/10

1 eleven years. The parties filed for dissolution of marriage in Los
2 Angeles Superior Court Case NO. BD 319152 entitled "Grayson Hoberg,
3 Petitioner vs. Laura Hoberg, Respondent" on or about April 2, 2000.
4 The dissolution action was resolved by a Stipulated Judgment entered
5 on July 25, 2000. (Trial Exhibit 1) The Debtor was represented by
6 counsel. Plaintiff represented herself.

7 A non jury trial was held before this bankruptcy court regarding
8 Plaintiff's complaint for nondischargeability, and upon the receipt
9 of documentary evidence and testimony, as well as the statements and
10 arguments of counsel, the matter was submitted.

11
12 The Stipulated Judgment

13 Paragraphs 24A and 24B of the Stipulated Judgment recite as
14 follows:

15 24. PAYMENT TO EQUALIZE DIVISION OF PROPERTY AND
16 OBLIGATIONS

17 A. Petitioner shall pay to Respondent the sum of
18 One Million Seven Hundred Thousand Dollars and Zero
19 Cents (\$1,700,000.00), hereinafter referred to as the
20 "EQUALIZATION PAYMENT" as follows: May 1, 2000 the sum
21 of \$12,000.00; June 1, 2000, July 1, 2000, August 1,
22 2000, September 1, 2000 and October 1, 2000 the sum of
23 \$7,000.00 on the first days of each of those months.
24 Commencing November 1, 2000 payments shall increase to
25 \$12,000.00 per month and continue on the first day of
26 each and every consecutive month thereafter until
27 April 1, 2001 wherein the balance of the "EQUALIZATION
28 PAYMENT" shall be paid in full to Respondent from
Petitioner. In the event the "EQUALIZATION PAYMENT"
is not paid in full on April 1, 2001, interest at the
rate of fifteen (15%) percent per annum shall be paid
monthly to Respondent on the unpaid balance.

B. The parties acknowledge, and the Court
thereon finds that a portion of the "EQUALIZATION
PAYMENT" payment is an equalization of the division of
community property, and a portion is to satisfy any
claim that Respondent may otherwise have for spousal
support. The parties agree, and the Court thereon
orders that the portion of the "EQUALIZATION PAYMENT"
paid in lieu of spousal support is non-taxable to

1 Respondent and non-deductible by Petitioner. (See
2 Trial Exhibit 1, pp. 20-21)

3 Paragraph 14, in pertinent part, states as follows:

4 14. SPOUSAL SUPPORT

5 A. The Court's jurisdiction to award spousal
6 support payable by Petitioner to Respondent and/or
7 payable by Respondent to Petitioner now, or at any
8 time in the future, shall terminate as of the date the
9 "EQUALIZATION PAYMENT," as set forth in Paragraph 24
10 A&B below, is paid in full.

11 B. The Spousal support provisions contained in
12 Paragraph A&B shall be non-modifiable. No Court shall
13 have jurisdiction to modify, extend or revoke any
14 orders awarding spousal support pursuant to Paragraph
15 24 A&B of this Judgment....

16 ...D. The Court finds and orders that Respondent
17 has waived all rights and claims to receive any money
18 or property for her support from Petitioner (except as
19 set forth to the contrary in Paragraph 24 A&B
20 hereinbelow) and all rights and claims to extend
21 duration of spousal support after payment in full of
22 the EQUALIZATION PAYMENT. Therefore, the Court
23 retains no jurisdiction to award spousal support
24 payable to Respondent from Petitioner after the
25 payment in full of the EQUALIZATION PAYMENT. The
26 Court further finds that Respondent has made this
27 waiver knowing that she cannot return to any Court at
28 any time and request spousal support having once
waived her right to receive it. Knowing this, and
after giving mature and intelligent thought to all the
factors involved in such a waiver, including but not
limited to the statistical facts set forth above, the
Court finds that Respondent has made this waiver. The
Court further finds that the parties have agreed that
this waiver constitutes consideration for this
Judgment and is given without fraud, duress, coercion
or promises no contained herein.

23 (Trial Exhibit No. 1, pp.12-13)

24 The Stipulated Judgment does not recite what portion of the
25 Equalization Payment constitutes spousal support and what portion
26 represents a division of community property.

27
28 Debtor's Attempt To Set Aside The Stipulated Judgment

1 On May 25, 2001, the Debtor filed a motion in the state court to
2 have the Stipulated Judgment set aside, specifically the provisions
3 relating to spousal support and property division, claiming that there
4 was a mistake in the valuation of the Earthlink stock. In addition,
5 Debtor alleged an agreement with the Plaintiff, whereby there would
6 be an increase in the valuation of the Earthlink stock from twenty-
7 four to twenty-seven dollars a share, this increase to recognize a
8 spousal support premium of \$227,663.00. (Trial Exhibit 2, p.74) The
9 state court issued a tentative ruling denying Debtor's motion, staying
10 further proceedings pending an order granting relief from automatic
11 stay and taking the motion off calendar. (Trial Exhibit 4, p.84)
12 To date, Debtor has not proceeded further with his motion.

13

14 **Debtor's Filed Bankruptcy Schedules**

15 In Bankruptcy Schedule E entitled, "Creditors Holding Unsecured
16 Priority Claims," filed July 5, 2001, Debtor reported "Spousal
17 Maintenance" of \$227,663.00. (Trial Exhibit 11, p.451)

18 On Bankruptcy Schedule F entitled, "Creditors Holding Unsecured
19 Nonpriority Claims," filed July 5, 2001, Debtor reported a total of
20 \$1,563,495.00, including the sum of \$1,368,820.00, described as
21 "equalization of division of marital community." (Trial Exhibit 11,
22 p.453)

23

24 **State Court Proceedings Filed By Plaintiff**

25 On February 24, 2002, the Plaintiff filed a motion requesting
26 that the state court determine that the Equalization Payment included
27 spousal support of \$1,213,357.00, with the balance constituting a
28 property division of \$486,643.00. (Trial Exhibit 7, p. 96-228)

1 The state court conducted a hearing on the matter on April 24,
2 2002, and upon examining the evidence, both oral and written, and
3 after hearing arguments, ruled in favor of the Plaintiff, determining
4 that the sum of \$1,213,357.00 constituted non-taxable spousal support,
5 with the remaining sum of \$486,643.00 representing a division of
6 property. (Trial Exhibit 8, p.266)

7 In this regard, on May 9, 2002, the state court issued an order
8 which, in pertinent part, recited:

9 3. The equalization payment set forth in the
10 Judgment entered on May 25, 2000, is determined to be
11 comprised of the sum of \$1,213,357.00, which is
12 characterized as non-taxable spousal support, and the
remaining sum of \$486,643.00, which is characterized
as property division.

13 4. All payments, which have been paid by
14 Petitioner towards the equalization payment to date,
15 which total the sum of \$108,075.07, are deemed to have
16 been paid towards the property division portion of the
equalization payment. No portion of said amount shall
be deemed to have been paid towards the spousal
support portion of the equalization payment. (Trial
Exhibit, p.271-272)

17 Debtor's Financial Circumstances

18 As of the first day of trial, i.e. February 24, 2003, the Debtor
19 was employed by "iblast." He is 44 years old and in good health. On
20 February 24, 2003, his monthly take home pay is \$9,357.62. His
21 monthly expenses are \$7,848.54 and consist of the following:

22	Child support	\$2,662.54
23	Rent	\$1,945.00
	Utilities	\$ 225.00
24	Food	\$ 350.00
	Clothing and Laundry	\$ 400.00
25	Medical	\$ 30.00
	Transportation	\$ 400.00
26	Recreation, entertainment, etc.	\$ 100.00
	Church	\$ 100.00
27	Insurance	\$ 186.00
	Piano lessons	\$ 250.00
28	IRS Garnishment	\$1,200.00
	TOTAL	\$7,848.54

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For the past six years, Debtor's salary has been:

	<u>Salary</u>	<u>Bonus</u>	<u>Severence</u>	<u>Total</u>
1997	\$106,798	0	N/A	\$106,798
1998	\$150,000	88,177	N/A	\$238,177
1999	\$183,654	75,360	N/A	\$259,014
2000	\$ 64,038	80,146	215,408	\$359,594
2001	\$ 83,333	25,000	51,897	\$160,230
2002	<u>\$200,000</u>	<u>50,000</u>	<u>N/A</u>	<u>\$250,000</u>
TOTAL	\$787,823	\$155,146	\$267,305	\$1,373,813

Plaintiff's Financial Circumstances

As part of the Stipulated Judgment, Plaintiff received \$794,378.07 in assets. The net value of these assets at the time of the divorce was as follows:

<u>Asset</u>	<u>Amount</u>
Retirement Accounts	\$211,403.00
Mutual Fund	\$ 10,700.00
Bank Account	\$ 47,840.00
Current Residence	\$248,950.00
Furnishings	\$ 40,000.00
Cars	\$ 55,000.00
Rental Property	\$ 72,410.00
<u>Equalization Payment</u>	<u>\$108,075.07</u>
TOTAL	\$794,378.07

Plaintiff receives \$2,662.54 monthly in child support from Debtor, who is current in making those payments.

Plaintiff is the beneficiary of a \$500,000.00 irrevocable trust

1 set up for her by her parents with no limitations. The trust owns a
2 life insurance policy payable upon the death of Plaintiff's parents.

3 Plaintiff is well qualified to earn a substantial living.
4 Plaintiff has a Masters in Accounting and a Bachelor of Arts degree,
5 being *magna cum laude* in Accounting. Plaintiff was a principal for
6 American Management Systems with the responsibility of managing over
7 120 people. American Management Systems is one of the leading
8 business consulting and systems integration firms with forty-nine
9 offices world wide and over \$1.2 billion in annual revenue. During
10 the last couple of years of the marriage, Plaintiff was approached
11 about returning to employment with companies such as Price Waterhouse
12 Coopers and KPMG, being offered a salary ranging from \$125,000.00 to
13 \$200,000.00 depending on whether Plaintiff's employment was to be
14 part-time or full-time, and excluding bonuses.

15
16 Nondischargeability of the Equalization Payment

17
18 Application of § 523(a)(5)

19 The court concludes that the Equalization Payment includes an
20 amount in lieu of spousal support of \$1,213,357.00, with the balance
21 of \$486,643.00 being a division of community property.

22 11 U.S.C. § 523(a)(5) is entitled "Exceptions to Discharge" and
23 provides:

24 (a) A discharge under section 727, 1141, 1228(a),
25 1228(b), or 1328(b) of this title does not discharge
an individual debtor from any debt -

26 (5) to a spouse, former spouse, or child of the
27 debtor for alimony to, maintenance for, or
support of such spouse or child, in connection
28 with a separation agreement, divorce decree or
other order of the court of record, determination
made in accordance with State or territorial law

1 by a governmental unit, or property settlement
2 agreement, but not to the extend that -

3 (A) such debt is assigned to another entity,
4 voluntarily, by operation of law, or
5 otherwise (other than debts assigned
6 pursuant to section 408(3) of the Social
7 Security Act, or any such debt which has
8 been assigned to the Federal government or
9 to a State or any political subdivision of
such State); or

7 (B) such debt includes a liability
8 designated as alimony, maintenance, or
9 support, unless such liability actually in
the nature of alimony, maintenance, or
support.

10 Whether a particular debt constitutes nondischargeable spousal
11 support or a division of property is a question of federal bankruptcy
12 law. In re Chang, 163 F.3d 1138, 1140 (9th Cir. 1998).

13 Under bankruptcy law, the intent of the parties at the time the
14 settlement agreement is executed determines whether a payment,
15 pursuant to the agreement, is alimony, support or maintenance within
16 the meaning of § 523(a)(5). In re Brody, 3 F.3d 35, 37 (2d Cir.
17 1993); Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984); In re
18 Sampson, 997 F.2d 717, 723 (10th Cir. 1993); Tilley v. Jessee, 789
19 F.2d 1074, 1078 (4th Cir. 1986). Where the specific intent of the
20 parties is not clearly stated in the agreement or order, courts have
21 considered such factors as need, the absence of support payments in
22 the dissolution decree, the presence of minor children in the
23 marriage, and a disparity of income between the parties. In re Gionis
24 170 B.R. 675, 682 (9th Cir. B.A.P. 1994).

25 However, in the instant case, the intent of the parties to
26 include in the Equalization Payment an amount in lieu of spousal
27 support is clearly indicated by the contents of Paragraphs 17A, 17B,
28 17D, 24A, and 24B of the Stipulated Judgment, as herein quoted.

1 The Stipulated Judgment, including these paragraphs, was drafted
2 primarily by the Debtor and his attorney, the Plaintiff representing
3 herself at the time. In view of the specific language agreed upon by
4 the parties in the Stipulated Judgment, the fact that the Equalization
5 Payment (1) was not subject to the events of death or remarriage, (2)
6 was substantially payable in a lump sum, (3) was non-negotiable, and
7 (4) was non-deductible, does not alter the parties' specific intent
8 that a portion of the Equalization Payment was in the nature of
9 spousal support with the balance a division of property.

10 In addition, the court gives substantial weight to the
11 Plaintiff's testimony regarding her intent to accept a sum in lieu of
12 spousal support, as well as her presentation set forth in Exhibit I,
13 (Trial Exhibit 8, p.215) establishing that the sum of \$1,213,357.00
14 constitutes an amount in lieu of support, with the property division
15 being \$486,643.00.

16 The court gives little, if any, weight to the Debtor's testimony
17 that the parties agreed that there was to be no spousal support, only
18 child support and a division of property. Debtor's testimony
19 regarding the contents of Exhibit H, (Trial Exhibit 8, p.216) and his
20 representations set forth in his bankruptcy schedules E and F,
21 likewise carry little, if any, weight.

22 Finally, the court gives significant weight to the state court's
23 decision and order of May 9, 2002, (Trial Exhibit 9, p.271-72)
24 granting relief to the Plaintiff, characterizing the sum of
25 \$1,213,357.00 as non-taxable spousal support, with the remaining sum
26 of \$486,643.00 being characterized as property division.

27 ///

28 ///

1 Application of § 523(a)(15)(A)

2 Section § 523(a)(15) provides an exception to discharge as
3 follows:

4 (15) not of the kind described in paragraph (5) that
5 is incurred by the debtor in the course of a divorce
6 or separation or in connection with a separation
7 agreement, divorce decree or other order in a court of
8 record, a determination made in accordance with State
9 or territorial law by a governmental unit unless --

10 (A) the debtor does not have the ability to pay
11 such debt from income or property of the debtor not
12 reasonably necessary to be expended for the
13 maintenance or support of the debtor or a dependent of
14 the debtor and, if the debtor is engaged in a
15 business, for the payment of expenditures necessary
16 for the continuation, preservation, and operation of
17 such business; or

18 (B) discharging such debt would result in a
19 benefit to the debtor that outweighs the detrimental
20 consequences to a spouse, former spouse, or child of
21 the debtor.

22 The statute presents a two prong test. First, the court must
23 examine the Debtor's ability to pay the debt. If he does not have the
24 ability to pay, the debt is discharged. If the ability pay does
25 exist, the court must then consider whether the benefits of giving a
26 discharge to the debtor outweighs the detriment that a discharge would
27 have upon a spouse, former spouse or child of the Debtor.

28 In the instant case, the court has determined herein that the
Equalization Payment included a division of property in the amount of
\$486,643.00, precluding the application of § 523(a)(5). In its May
9, 2002 order, the state court directed that the Debtor's payments of
\$108,075.07 were deemed to have been paid towards the property
division, thus reducing the balance of the property division
obligation to \$378,567.93. Accordingly, this court must determine

1 whether the indebtedness of \$378,567.93, plus accrued interest¹, is
2 dischargeable under § 523(a)(15).

3 The Debtor, at the start of trial on February 24, 2003, was
4 employed by "iblast," being laid off on May 7, 2003. In his last
5 position, while working at iblast, his take home pay was \$9,357.62.
6 His monthly expenses were \$7,848.54. There has not been a challenge
7 to the reasonableness of these expenses, either from the standpoint
8 of present circumstances or the foreseeable future. As of the trial
9 date, the Debtor's current monthly disposable income was \$1,509.08
10 (i.e. \$9,357.62 less \$7,848.54), which on an annual basis would amount
11 to the sum of \$18,108.96 (i.e. \$1,509.08 x 12 months).

12 However, to be considered is the Debtor's future disposable
13 income calculated over a reasonable period of time, as well as his
14 past payment history. See In re Myrvang, 232 F.3d 1116, 1120 (9th
15 Cir. 2000). The record reflects that his average annual salary over
16 the past six years amounts to \$228,969.00 (i.e. \$1,373,813.00 divided
17 by six years). Considering the Debtor's age, experience, health and
18 past earning capacity, the court finds that the Debtor has the ability
19 to earn an annual salary of \$228,969.00 over the next several years.
20 The Debtor has failed to present credible evidence of a future income
21 stream over the next several years which would be otherwise.
22 Annualizing his monthly expenses of \$7,848.52 amounts to the sum of
23 \$94,182.24 (\$7,848.52 x 12 months). Therefore, Debtor's annual
24 disposable income over the next several years would amount to
25

26 ¹ Paragraph 24A of the Stipulated Judgment provided for the payment of
27 interest on the unpaid balance of the Equalization Payment. Two issues have been
28 raised concerning the payment of this interest: (1) whether the prescribed 15
percent is an appropriate rate and (2) whether interest should accrue from the
Stipulated Judgment date on April 1, 2001. These issues are addressed herein
following the instant analysis.

1 \$134,786.96 (i.e. \$228,969.00 less \$94,182.24). No credible evidence
2 has been presented by the Debtor establishing that his annual
3 disposable income over the next several years would be otherwise.

4 The court determines that neither his current disposable income
5 of \$18,108.96, nor his anticipated annual future disposable income of
6 \$134,786.96 over the next several years, are sufficient to pay the
7 principal amounts of spousal support and property division, together
8 with accrued interest thereon, over the next several years.

9 As herein provided, the court has determined that interest on any
10 unpaid balance of the Equalization Payment was to commence from April
11 1, 2001 at the annual rate of fifteen percent rather than the
12 Stipulated Judgment date of May 25, 2000. With respect to the unpaid
13 spousal support portion of the Equalization Payment of \$1,213,357.00,
14 accrued interest amounts to \$346,547.85 as of the trial date of
15 February 24, 2003, with a daily amount accruing thereafter in he
16 amount of \$488.63.

17 Regarding the unpaid balance of the property division obligation
18 of \$378,567.93, accrued interest from April 1, 2001 to the trial date
19 amounts to \$107,919.60, with a daily amount accruing thereafter in the
20 amount of \$155.28. As of the February 24, 2003 trial date, the total
21 amount of the two obligations amounts to \$2,046,392.40, including
22 accrued interest to February 24, 2003, computed as follows:

23	Unpaid spousal support	\$1,213,357.00
24	Accrued interest thereon	346,547.85
25	Unpaid property division	378,567.93
26	Accrued interest thereon	<u>107,919.60</u>
27		\$2,046,392.48

28 Commencing February 3, 2003, interest on both the unpaid spousal

1 support and property division obligations are accruing at the daily
2 amount of \$642.31 (i.e. \$488.03 plus \$155.28).

3 Under California law, spousal and family support orders are
4 enforceable in perpetuity until paid. In re Marriage of Copeland 90
5 Cal.App.4th 324, 328-329 (2001).

6 Because of the Debtor's perpetual obligation to pay spousal
7 support totaling \$1,559,904.85 (\$1,213,357.00 plus \$346,547.85) as of
8 February 24, 2003, plus daily interest thereafter of \$488.63, the
9 court finds that the Debtor does not have the ability to pay the
10 property division obligation of \$486,487.53 (\$378,567.93 plus
11 \$107,919.60) as of February 24, 2003, plus the daily interest thereof
12 of \$155.28, considering his current disposable income of \$18,108.96
13 and his anticipated future disposable income of \$134,786.96 over the
14 next several years. Therefore, the property division obligation is
15 discharged under § 523(a)(15)(A).

16
17 Application of § 523(a)(15)(B)

18 Having considered the application of § 523(a)(15)(A), the court
19 addresses the application of § 523(a)(15)(B). To be determined, based
20 upon a balance of the equities, is whether the Debtor's benefit from
21 the discharge of the property division obligation outweighs any
22 detriment to the Plaintiff. See In re Myrvang, 232 F.3d. 1116, 1121
23 (9th Cir. 2000).

24 Balancing the equities, the court finds that the benefit to the
25 Debtor outweighs any detriment to the Plaintiff. As part of the
26 Stipulated Judgment, Plaintiff received \$794,378.07 in assets. She
27 currently receives \$2,662.54 monthly child support from the Debtor,
28 who appears currently to be making these payments.

1 Plaintiff is the beneficiary of a \$500,000.00 irrevocable trust
2 set up for her by her parents with no limitations. The trust owns a
3 life insurance policy payable upon the death of Plaintiff's parents.

4 As stated herein, Plaintiff is well qualified to earn a
5 substantial living. Plaintiff has a Masters in Accounting and a
6 Bachelor of Arts degree, being *magna cum laude* in Accounting.
7 Plaintiff was a Principal for American Management Systems with the
8 responsibility of managing over 120 people. American Management
9 Systems is one of the leading consulting and systems integration firm
10 with forty nine offices world wide and over \$1.2 billion in annual
11 revenue. During the last two years of her marriage to the Debtor,
12 Plaintiff has been approached concerning employment with leading
13 accounting and management companies, being offered a salary ranging
14 from \$125,000 to \$200,000 depending on whether Plaintiff's employment
15 was to be part-time or full-time, excluding bonuses.

16 In contrast, the Debtor is faced with satisfying a perpetual,
17 nondischargeable spousal support judgment of \$1,559,904.85, plus
18 accrued interest from February 24, 2003 at the daily amount of
19 \$488.63.

20 The Debtor's annual disposable income of \$134,786.96 over the
21 next several years, however, is insufficient to pay the perpetual
22 support obligation, coupled with the property division obligation.
23 Considering both the Plaintiff's and the Debtor's circumstances, and
24 balancing the equities, the court finds that the discharge of the
25 property division obligation would be a greater benefit the Debtor
26 than any detriment to the Plaintiff caused by the discharge.
27 Therefore, the property division obligation is discharged under
28 §523(a)(15)(B), as well.

1 Award of Attorneys Fees

2 In the Stipulated Judgment dated May 25, 2000, the parties agreed
3 to the following with respect to payment of attorneys fees:

4 44. PAYMENT OF ATTORNEYS FEES AND COSTS

5 A. In the event that either party hereto brings
6 any action or proceeding to enforce any provision
7 contained in this Judgment, or in any other made by a
8 Court in connection with this Judgment, the party
9 prevailing in such action or proceeding will be
entitled to receive from the other such reasonable
attorney's fees and other reasonably necessary costs
regardless of the need and/or ability of the parties
to pay the same. (See Trial Exhibit, p.30)

10 During the divorce proceedings, the state court awarded the
11 following attorneys fees to be paid by the Debtor representing his
12 contributive share of attorneys fees incurred by the Plaintiff.

13	<u>Award Date</u>	<u>Amount</u>	
14	April 30, 2001	\$ 12,000.00	(Trial Exhibit 2, p.41)
15	December 19, 2001	\$ 11,530.00	(Trial Exhibit 5, p.90)
16	January 30, 2002	\$ 53,000.00	(Trial Exhibit 6, p.94)
17	May 9, 2002	<u>\$ 4,000.00</u>	(Trial Exhibit 9, p.272)
18	TOTAL	\$ 80,530.00	

19
20 Award of \$12,000.00

21 Prior to the Debtor filing his chapter 7 petition on May 5, 2000
22 and subsequent to the filing of the Stipulated Judgment on May 25,
23 2000, the Plaintiff brought an OSC pursuant to the Domestic Violence
24 Protection Act re Restraining Orders, Modified Child Visitation,
25 Attorneys Fees and Other Orders and an OSC re Injunctive Relief;
26 Determination and Collection of Arrears Attorneys Fees and Other
27 Orders, resulting in the state court filing an order on July 19, 2001,
28 restraining the Debtor's activities with respect to contacts with

1 Plaintiff and their son, as well as modifying visitation rights and
2 cooperating with the Child Custody Evaluation Panel. With respect to
3 the award of attorneys fees, the order provided:

4 12. The sum of Twelve Thousand Dollars
5 (\$12,000.00) shall be paid by Petitioner to Frank O.
6 Fox of the Law Firm of Fox And Fox from funds on
7 deposit in Petitioner's Credit Suisse First Boston
8 account, number RAHWR, forthwith.

9 13. Respondent's request for additional
10 attorney's fees and costs is reserved to the time of
11 the review hearing on November 6, 2001. (See Trial
12 Exhibit 2, p.41)

13 The contents of the state court order reflect that the Plaintiff was
14 the prevailing party.

15 Award of \$11,530.00

16 Pursuant to a hearing held on December 19, 2001 before the state
17 court, an order was filed shortly thereafter concerning the production
18 of records, as well as visitation rights and injunctive relief. The
19 order also provided the following as to attorneys fees:

20 8. Petitioner shall pay to Respondent the sum of
21 \$11,530.00 as and for the attorney's fees that
22 Respondent incurred related to the domestic violence
23 proceedings against Petitioner. The Court reserves
24 the determination of when said amount shall be paid to
25 the hearing, which is set tot take place on January
26 30, 2002.

27 9. Respondent's Motion for Attorney's Fees,
28 Costs and Other Orders is continued to January 30,
2002, at 8:30 a.m. in the above-entitled Court. (See
Trial Exhibit 5, p.88)

The contents of the state court order reflect that the attorneys
fees were related to prior domestic violence proceedings wherein the
Plaintiff was the prevailing party.

///

///

1 Award of \$53,000.00

2 Pursuant to a hearing held before the state court on January 30,
3 2002, the court filed an order which stated the following regarding
4 the award of \$53,000.00:

5 1. In addition to any attorney's fees and/or
6 costs, which have been previously ordered and pursuant
7 to the criteria set forth in the cases of In re
8 Marriage of Cueva and In re Marriage of Keech, the
9 Court finds that the sum of \$53,000 in attorney's fees
10 was reasonably incurred by Respondent and based solely
11 upon prevailing party provision set forth in the
12 parties' stipulated Judgment Of Dissolution of
13 Marriage, orders said sum of \$53,000 payable by
14 Petitioner, GRAYSON HOBERG, to Respondent, Laura
15 Hoberg. Said amount is made up of the following
16 components:

- 17 a. \$8,000 relating to the issues of blocking
18 Petitioner's accounts and securing funds for
19 the payment of Respondent's obligations to
20 Respondent;
- 21 b. \$22,000 relating to Respondent obtaining a
22 judicial determination of the amount of
23 arrears owed by Petitioner to Respondent;
- 24 c. \$11,000 relating to Respondent opposing
25 Petitioner's unsuccessful attempt to set
26 aside the Stipulated Judgment; and
- 27 d. \$12,000 relating to filing and appearing on
28 Respondent's motion to obtain attorney's
fees. (See Trial Exhibit 6, p.94)

21 Award of \$4000.00

22 Pursuant to the hearing held on April 24, 2003, the state court
23 filed an order on May 9, 2002, which included the following provision
24 as to the award of attorneys fees:

25 5. Petitioner, Grayson Hoberg, shall pay to
26 Respondent's attorney, Frank O. Fox of The Law Firm of
27 Fox and Fox, the additional sum of Four Thousand
28 Dollars (\$4,000.00) as and for his contributive
portion of Respondent's attorney's fees. The Court
reserved the issue of how said payment will be paid
until the next hearing. (See Trial Exhibit 9, pp.
272-3)

1 A review of the record of the April 24, 2002 hearing reflects
2 that the Plaintiff was the prevailing party, as the state court's
3 findings conform to the Plaintiff's contentions regarding the contents
4 of the Equalization Payment.

5
6 Attorneys Fees Treated as Prepetition Debts

7 In the instant case, the court finds that the post petition award
8 of attorneys fees by the state court totaling \$80,530.00 are rooted
9 in and are relevant to the prepetition Stipulated Judgment.
10 Accordingly, they are treated as prepetition debts, subject to
11 discharge, unless an exception applies. In re Vicky Lynn Marshall,
12 273 B.R. 822, 830 (Bankr. C.D.Cal. 2002); see In re Kadjevich, 220
13 F.3d 1016 (9th Cir. 2000).

14
15 Application of § 523(a)(5) to Attorneys Fees

16 As stated in Collier Family Law and the Bankruptcy Code ¶6.05[1]
17 (2003) (footnotes omitted):

18 It is extremely common for one spouse to agree or
19 be ordered to pay the attorney's fees of the other in
20 a divorce proceeding. Sometimes, attorney's fees are
21 awarded in other family law proceedings, such as those
22 involving child custody. Whether such awards are
23 dischargeable under section 523(a)(5), as in cases of
24 other types of marital obligations, depends primarily
25 on the intent of the award or agreement in light of
26 the parties' circumstances at the time it occurred.

27 If the purpose of the fee award in marital dissolution
28 proceedings is to provide support, then the fee award is
nondischargeable under 11 U.S.C. §523(a)(5). In re Catlow 663 F.3d
960, 962 (9th Cir. 1981). A number of factors may be relevant to the
determination of what constitutes support. In re Gionis 170 B.R. 675,
682 (9th Cir. B.A.P. 1994). Need is an important factor, as is the

1 absence of support payments in the decree, the presence of minor
2 children in the marriage, and a disparity of income between the
3 parties. Id.

4 If the evidence reflects that the award of attorney's fees was
5 not based upon need or the financial circumstances of the parties,
6 then attorney's fees relating to marital dissolution proceedings can
7 be discharged. In re Gibson 103 B.R. 218, 221 (9th Cir. B.A.P. 1989).

8 In the instant case, the court finds that the parties intended
9 that attorneys fees be awarded to the prevailing party regardless of
10 need and/or the ability of the parties to pay attorneys fees. This
11 intent is stated specifically in Paragraph 44A of the Stipulated
12 Judgment, referred to herein. These factors are significant in terms
13 of determining whether the attorneys fees in question constitute
14 support, or in the nature of support. As the parties specifically
15 excluded these factors in determining the fees to be awarded, the
16 parties did not intend that the award of attorneys fees be support or
17 in the nature of support. The parties agreed that attorneys fees were
18 awarded exclusively on the basis of who was the prevailing party.
19 Therefore, the attorneys fees in question do not fall within the
20 purview of the support exception to discharge under § 523(a)(5). As
21 such, they are dischargeable unless they are excepted from discharge
22 under § 523(a)(15).

23

24 Application of § 523(a)(15) to Attorneys Fees

25 As the attorneys fees in question do not constitute support, or
26 in the nature of support under § 523(a)(5), the court addresses
27 whether the attorneys fees are nondischargeable under § 523(a)(15).

28 The court finds that the provisions of Paragraph 44A preclude a

1 determination of dischargeability under § 523(a)(15)(A), as the
2 parties agreed in the Stipulated Judgment that the ability to pay was
3 not to be considered in the award of attorneys fees.

4 For the reasons stated with respect to the dischargeability of
5 the property division obligation under § 523(a)(15)(B), the court
6 finds that the attorneys fees in question are dischargeable under §
7 523(a)(15)(B), as the benefit to the Debtor from the discharge of
8 these fees outweighs any detriment to the Plaintiff.
9

10 Commencement Date Re Payment of Interest

11 Paragraph 24A of the Stipulated Judgment provides for the payment
12 of the Equalization Payment. During the period May 1, 2000 through
13 March 1, 2001, various installment payments, as more specifically
14 identified in Paragraph 24A, were to be made on the first of each
15 month to the Plaintiff with the unpaid balance to be paid in full on
16 April 1, 2001. In the event the Equalization Payment were not paid
17 in full on April 1, 2001, the Stipulated Judgment provided that
18 interest at the rate of 15 percent per annum was to be paid monthly
19 to the Plaintiff on the unpaid balance.

20 As of April 1, 2001, there was paid to the Plaintiff a total of
21 \$108,075.07, which, pursuant to the state court's order of May 9,
22 2002, was deemed to have been paid toward the property division of the
23 Equalization Payment. No other payments have been made by the Debtor
24 since April 1, 2001.

25 There appears to be no dispute that Plaintiff is entitled to
26 interest on any unpaid balance of the Equalization Payment.
27 Plaintiff, however, contends that interest should accrue from the date
28 of the filing of the Stipulated Judgment, i.e. July 25, 2000. The

1 Debtor asserts that interest should accrue from April 1, 2001.

2 The court finds that the appropriate date for interest to
3 commence to run in the unpaid balance of the Equalization Payment is
4 April 1, 2001. The Stipulated Judgment is void of any interest being
5 due to the Plaintiff with respect to any of the installment payments
6 to be paid on the first of each month from May 1, 2000 thru April 1,
7 2001, or on the payment of interest on the unpaid balance as of any
8 date other than April 1, 2001. To compute interest from the filing
9 date of the Stipulated Judgment would be inconsistent with the plain
10 language set forth in Paragraph 24A directing that if the Equalization
11 Payment were not paid in full on April 1, 2000, interest at the rate
12 of fifteen percent per annum shall be paid monthly to Plaintiff on the
13 unpaid balance.

14

15 Rate of Interest

16 The Debtor contends that the interest rate of fifteen percent per
17 annum, as prescribed in Paragraph 24A of the Stipulated Judgment, is
18 usurious and should not be allowed.

19 The court finds that the Debtor's contention lacks merit. The
20 essential elements of usury are: (1) the transaction must be a loan
21 or forbearance, (2) the interest to be paid must exceed the statutory
22 maximum, (3) the loan and interest must be absolutely repayable by the
23 borrower, and (4) the lender must have had a willful intent to enter
24 into a usurious transaction. Ghirado v. Antonioli, 8 Cal.4th 791, 798
25 (1994).

26 The Equalization Payment described in the Stipulated Judgment
27 does not constitute a loan or forbearance. Therefore, one of the
28 essential elements of usury is lacking.

1 Article XV, Section 1 of the California Constitution provides
2 that the rate of interest on a judgment rendered by a California court
3 should not exceed 10 percent per annum. However, the disposition of
4 marital property is not subject to this limitation, but is governed
5 by the dictates of fairness and equity. In re Marriage of Escamilla,
6 127 Cal.App.3d. 963, 967 (1992); In re Marriage of Stallcup, 97
7 Cal.App.3d 294, 302 (1979).

8 The cases of Escamilla and Stallcup applied California Civil Code
9 Section 4800, which has since been repealed as of January 1, 1994.
10 Family Law Section § 2550 has replaced § 4800 and determines the
11 disposition of community property.

12 The court finds that the rate of interest of fifteen percent per
13 annum on the unpaid balance of the Equalization Payment is fair and
14 equitable, the court being influenced by the fact that both Plaintiff
15 and the Debtor agreed to this rate in approving the Stipulated
16 Judgment, the rate also being approved by the state court. The
17 provisions of § 2550 have not changed California law with respect to
18 the rate of interest regarding any disposition of marital property
19 being governed by fairness and equity.

20 21 Indemnity for Taxes

22 Paragraph 31C of the Stipulated Judgment provided as follows:

23 C. Each party will indemnify and hold harmless
24 the other party on his/her portion of the tax
25 obligations defined in this Judgment and will
26 reimburse the other party for all damages and costs
27 incurred as a result of a party's failure to abide by
28 the terms of this section, including reasonable
attorneys' fees, accountants' fees and other costs,
whether incurred in defending an action by a taxing
authority or in enforcing the provisions of this
section. (See Trial Exhibit 1, pp.23-25)

When one spouse has agreed to pay the taxes or hold the other

1 spouse harmless from taxes pursuant to a divorce decree, that
2 agreement as to liability is subject to a determination under 11
3 U.S.C. § 523(a)(5) and (a)(15). Collier Family Law and the Bankruptcy
4 Code ¶6.08[2] (2003).

5 The intent of the parties at the time of the settlement agreement
6 determines whether an obligation is alimony, support or maintenance
7 within the meaning of § 523(a)(5). Shaver v. Shaver, 736 F.2d at
8 1316.

9 The court determines that the Debtor's obligation to hold the
10 Plaintiff harmless from certain tax liabilities is not in the nature
11 of support under § 523(a)(5). In making this determination, the court
12 finds that the Plaintiff has failed to meet her burden of proving that
13 the intent of the parties at the time the Stipulated Judgment was
14 executed was that the indemnity and hold harmless provision regarding
15 tax obligations was in the nature of support. In this regard, it is
16 of some consequence that the Stipulated Judgment is silent as to
17 whether this provision is in the nature of support in view of the fact
18 that there exist other provisions describing child and spousal
19 support.

20 As to the application of § 523(a)(15)(A), the court finds that
21 in view of the perpetual nondischargeable support obligation, the
22 Debtor does not have the ability to comply with the indemnity and hold
23 harmless tax provisions for the same reason that he does not have the
24 ability to pay the property division obligation as herein stated.
25 Therefore, he is discharged from this obligation under §
26 523(a)(15)(A). The court finds that, as is the case with respect to
27 the property division and attorneys fees, the benefits of a discharge
28 of this obligation outweighs any detriment to the Plaintiff.

1 Dismissal of the 11 U.S.C. § 523(a)(2) Claim

2 Plaintiff's second amended for relief alleged that when the
3 Debtor entered into the Stipulated Judgment, he never intended to pay
4 the Equalization Payment. Plaintiff prayed that the Equalization
5 Payment be determined to be nondischargeable under §523(a)(2)².
6 (Complaint, ¶ 12-14)

7 Though the allegation was denied by the Debtor in his answer, the
8 Joint Pretrial Order submitted by the parties and entered by the court
9 on February 19, 2003 fails to present any issue of fact and/or law
10 regarding the application of § 523(a)(2). In addition, pretrial and
11 post trial briefs fail to address any issue regarding § 523(a)(2).
12 Accordingly, the court dismisses the Plaintiff's claim under §
13 523(a)(2) for failure to prosecute.

14
15 The contents of this Memorandum shall constitute the court's
16 findings of fact and conclusions of law.

17
18 Dated: 9/25, 2003

19 
20 ARTHUR M. GREENWALD
21 UNITED STATES BANKRUPTCY JUDGE
22
23
24
25
26
27

28 ² The Complaint, however, fails to specify whether the claim arises under
§ 523(a)(2)(A) and/or § 523(a)(2)(B).